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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR
REGION X
SEP 29 3:12

IN RE)
)
SIM-CHEM MINERALS AND) I.F. & R. Docket No. X-32C
CHEMICALS DIVISION OF)
SIMPLOT SOILBUILDERS,)
J. R. SIMPLOT COMPANY,)
)
)
Respondent.)

Respondent admitted that violations of the governing statute occurred as alleged in the complaint. Lesser penalty than proposed in the complaint found proper. Order entered assessing such penalty.

Stephen A. Beebe for respondent.
John Hohn for complainant.

INITIAL DECISION BY WILLIAM J. SWEENEY
ADMINISTRATIVE LAW JUDGE

By complaint filed on December 31, 1975, the United States Environmental Protection Agency, Region X, alleged that the respondent had violated Sections 3 and 12 of the Federal Insecticide, Fungicide, and Rodenticide Act as specified in such complaint. The respondent requested a hearing. A prehearing conference was held in Boise, Idaho on March 16, 1976, and an adjudicatory hearing was held in the same city on May 5, 1976. The parties have filed briefs and a reply brief was filed by complainant.

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The violations specified in the complaint are that on or about September 14, 1974 the respondent held for sale a pesticide, Parathion 4E, which was: 1) misbranded in that the labeling showed the product to contain as active ingredients 47.3 percent of Parathion whereas it contained a lesser amount; 2) adulterated in that another substance, Methyl Parathion, had been substituted in whole or in part for the article; 3) misbranded in that the label showed EPA Reg. No. 476-603-15154, whereas such registration number was not issued to the respondent. No penalties were proposed for the cited misbrandings and a penalty of \$5,000 was proposed for the adulteration violation. On brief the complainant noted that respondent had not violated the Act prior to the violations charged in the complaint, had cooperated in the discovery and correction of the alleged violations, and had otherwise exhibited good faith efforts to comply with the Act. Therefore, it was recommended by the complainant that the proposed penalty be reduced by 60 percent, namely, to \$2,000.

The evidence shows, and the respondent admits, that at least one 5-gallon can of a pesticide it had manufactured as

Methyl Parathion had been inadvertently labeled Ethyl Parathion. Counsel for complainant explained that the proposed penalty was published in Section II of the GUIDELINES FOR THE ASSESSMENT OF CIVIL PENALTIES UNDER SECTION 14(A) OF THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT, AS AMENDED. In that Section, a table entitle ANALYTICAL TEST RESULTS: FORMULATION VIOLATIONS has four categories. Number 3 is entitled CHEMICAL CONTAMINATION and it was such category that was applied to the aforesaid adulteration, namely presence of Methyl Parathion instead of the labeled Ethyl Parathion. The respondent is a so-called Category V firm because its gross annual sales are in excess of a million dollars. The penalty provided for a firm of that size charged with a significant level of chemical contamination is as proposed in the complaint.

The respondent argues on brief that in order for it to be found guilty of an adulteration violation the evidence must show an intent to adulterate. Such argument is without merit and the intent or lack of intent of a violator is not an issue in proving that a punishable violation occurred.

Although intent is not an issue, the proposal to penalize respondent for adulteration rather than misbranding is subject to question on other grounds. It is possible to

have misbranding without concomitant adulteration, but every adulteration violation necessarily is accompanied by misbranding. Normally, the adulteration, whether consisting of chemical or weight deficiency, chemical contamination, or overformulation, is the cause for the product to be other than as described on the label, and hence the misbranding violation. In such cases the violation to be charged is properly the root offense, adulteration. Such is not true of the facts under consideration herein. The pesticide Methyl Parathion was knowingly and intentionally prepared by the respondent. It was not deficient, contaminated nor overformulated. Then, through error, the label for a different pesticide was attached to the container. Presto, an unadulterated product becomes adulterated. In the circumstances, the cause of the resultant state of adulteration, namely the misbranding, is the proper violation to be penalized.

The labeling violation herein consists of a defective ingredient statement concerning the formulation of the subject pesticide. The facts of record do not prove what adverse effects, if any, would be caused by using Methyl Parathion in the belief that it was Ethyl Parathion. The guidelines provide a penalty of \$2,800 for the labeling

violation by respondent, when the adverse effects are unknown. Accepting the complainant's recommendation of a 60 percent reduction in the guideline penalty produces a penalty of \$1,120. The careless handling of a label as shown herein is inexcusable and the assessment of the latter penalty is fully warranted.

ORDER

1. Pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, [86 Stat. 973; 7 USC 136 1(a)], a civil penalty of \$1,120 is hereby assessed against Sim-Chem Minerals and Chemicals Division of Simplot Soilbuilders, J. R. Simplot Company.
2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon respondent by forwarding to the Regional Hearing Clerk, Region X, a cashier's check or certified check payable to the United States of America in such amount.

Dated: September 13, 1976

William J. Sweeney
William J. Sweeney
Administrative Law Judge